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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 KFORCE INC,

11 Plaintiff,

12 v.

13 BRETT OXENHANDLER, et al.,

14 Defendants.

CASE NO. C14-774 MJP

ORDER ON DEFENDANTS'  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

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16 THIS MATTER comes before the Court on Defendants' Motion for Partial Summary  
17 Judgment. (Dkt. No. 34.) Having reviewed the Parties' briefing and all related papers, the Court  
18 GRANTS in part and DENIES in part the motion.

19 **Background**

20 Plaintiff Kforce and Defendant Vanderhouwen & Associates ("VHA") are competitors in  
21 the "technology specialty staffing business," placing candidates into job openings with  
22 technology employers in search of new talent. (Dkt. Nos. 21 at 2-5, 34 at 2-4.) Plaintiff brings  
23 suit alleging that Defendants Brett Oxenhandler and Collette Bell, former Kforce employees who  
24 now work at VHA, and Patrick Walker, a VHA employee, stole a variety of confidential and

1 proprietary information from Kforce for use at VHA. (Dkt. No. 21.) Plaintiff also alleges that  
2 VHA employees solicited Kforce employees, encouraging them to break their employment  
3 agreements with Kforce, and also solicited Kforce customers, attempting to divert their business  
4 to VHA. (Id.)

5 Defendants now move for summary judgment on five of Plaintiff's eight claims – breach  
6 of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with  
7 business relationships, unfair competition, and unjust enrichment – because these claims are  
8 preempted by the Uniform Trade Secrets Act. (Dkt. No. 34.) Defendants also move for  
9 summary judgment on Plaintiff's Consumer Protection Act unfair competition claim, in the  
10 alternative, because Plaintiff cannot meet the public interest requirement. (Id.) Finally,  
11 Defendants request that the Court grant summary judgment on all claims as to improper  
12 solicitation of Plaintiff's customers because Plaintiff's Fed. R. Civ. P. 30(b)(6) deponent was  
13 unprepared and uninformed at his deposition and could not name any customers that had been  
14 solicited. (Id.)

15 Plaintiff opposes the motion, arguing that these claims are independent of its trade secret  
16 misappropriation claim because the claims are based on the theft and misuse of non-trade secret  
17 information and because the solicitation of Kforce employees and customers are separate wrongs  
18 which do not involve the acquisition or disclosure of confidential information. (Dkt. No. 36.)  
19 Plaintiff also argues that it has satisfied the Consumer Protection Act's public interest  
20 requirement, and that Defendants' Fed. R. Civ. P. 30(b)(6) arguments should be rejected as  
21 improperly attempting to transform a discovery dispute into a dispositive motion. (Id.)

## 22 Discussion

### 23 I. Legal Standards

#### 24 A. Summary Judgment

Summary judgment is proper where “the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In assessing whether a party has met its burden, the underlying evidence must be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

#### B. Uniform Trade Secrets Act Preemption

The Washington Uniform Trade Secrets Act (“UTSA”), like the uniform trade secrets acts of other jurisdictions, “displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret.” RCW 19.108.900(1). The UTSA does not displace “[c]ontractual or other civil liability or relief that is not based upon misappropriation of a trade secret.” RCW 19.108.900(2). Essentially, “[a] plaintiff may not rely on acts that constitute trade secret misappropriation to support other causes of action.” Thola v. Henschell, 140 Wn. App. 70, 82 (2007) (internal quotation marks and citation omitted).

To determine whether the UTSA preempts a civil claim, the Court must: “(1) assess the facts that support the plaintiff’s civil claim; (2) ask whether those facts are the same as those that support the plaintiff’s UTSA claim; and (3) hold that the UTSA preempts liability on the civil claim unless the common law claim is factually independent from the UTSA claim.” Id. Proper application of the preemption test “precludes duplicate recovery for a single wrong.” Id.

A majority of courts hold that it is not necessary to determine whether the information that a plaintiff alleges was misappropriated constitutes a trade secret before determining whether the UTSA displaces the plaintiff’s common law claims. See Int’l Paper Co. v. Stuit, 2012 WL 1857143, at \*7 (W.D. Wash. May 21, 2012) (citing CDC Restoration & Constr., LC v.

1 Tradesmen Contractors, LLC, 274 P.3d 317, 330 n. 6 (Utah Ct.App. 2012), and Allied Erecting  
 2 & Dismantling Co. v. Genesis Equip. & Mfg., Inc., 649 F.Supp.2d 702, 721-22 (N.D. Ohio  
 3 2009) (collecting cases)). This conclusion stems from the fact that the UTSA's preemption  
 4 provision has generally been interpreted to abolish all free-standing alternative causes of action  
 5 for theft or misuse of confidential, proprietary, or otherwise secret information falling short of  
 6 trade-secret status. Id. (citations omitted). Where possible, Washington construes the UTSA to  
 7 achieve uniformity among jurisdictions that have adopted it. Thola, 140 Wn. App. at 78.

## 8 II. Facts Underlying Plaintiff's Claims

9 To determine whether the UTSA preempts Plaintiff's civil claims, the Court must assess  
 10 whether the facts that support the claims are the same as, or independent from, those that support  
 11 Plaintiff's UTSA claim. Thola, 140 Wn. App. at 82.

### 12 A. Facts Supporting Plaintiff's Misappropriation of Trade Secrets Claim

13 Plaintiff's First Amended Complaint alleges that Defendants misappropriated  
 14 "confidential Client, Applicant, employee and customer information and other property of  
 15 Kforce" that constitute trade secrets under the Washington and Texas UTSA's. (Dkt. No. 21 at  
 16 14.) In the Complaint's "Factual Background and Misconduct Allegations" section, Plaintiff  
 17 alleges that it has "developed large quantities of confidential and proprietary information that it  
 18 uses daily in the function of its business. This information includes competitively advantageous  
 19 and valuable elements such as confidential communications among management personnel,  
 20 compilations and information regarding Clients and prospective Clients (including Client contact  
 21 information, Client preferences and needs, and Client rates), compilations of employment  
 22 Applicants, salary information for Kforce's employees, Kforce's financial and budgetary  
 23 information, and information related to marketing strategy." (Id. at 3.)  
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Plaintiff alleges that “[a]n extremely valuable segment of Kforce’s confidential information is that which Kforce has developed over the years regarding the identity of Kforce’s Clients and Applicants, the purchase activity of Kforce’s Clients, pricing information, compensation information, key contact information and personnel, and other proprietary, customer-specific information regarding Kforce’s Clients and Applicants (“Confidential Information”).” (Id.) Plaintiff alleges that is has expended substantial time and resources developing its Confidential Information, and has engaged in efforts to protect the secrecy of this information. (Id. at 4.) Plaintiff alleges that Defendants were given access to this information through their employment at Kforce, and were required to sign employment agreements that restricted Defendants’ access to and use of the Confidential Information. (Id. at 5-8.)

#### B. Facts Supporting Plaintiff’s Other Claims

In support of a breach of fiduciary duty claim, Plaintiff alleges that Defendants “purloined confidential records of Kforce and engaged in conduct beyond preparations to obtain different employment or form a different business. Instead, they both planned with and assisted VHA to compete unfairly and concealed their unfaithful conduct by lying to their respective Kforce supervisors about the reasons for terminating Kforce employment.” (Dkt. No. 21 at 14.) In support of an aiding and abetting breach of fiduciary duty claim, Plaintiff alleges that Defendants Walker and VHA “secretly planned and schemed with Oxenhandler and Bell to deprive Kforce of its records, customers, and trade secrets.” (Id. at 15.)

In support of a tortious interference with business relationships cause of action, Plaintiff alleges that Defendants “Walker and VHA [i]ntentionally interfered with Kforce’s contractual and employment relationships with Oxenhandler and Bell by inducing Oxenhandler and Bell to engage in the wrongful conduct described above. Further, [Defendants] misappropriat[ed]

1 Kforce's customer information and other property and utiliz[ed] such information and property  
2 to wrongfully solicit Kforce customers... [D]efendants have intentionally and tortiously  
3 interfered with the business relationships between Kforce and its Clients, Applicants, business  
4 prospects and customers.” (Dkt. No. 21 at 15.)

5 In support of an unfair competition claim under the Consumer Protection Act, Plaintiff  
6 alleges that “[t]he conduct of [Defendants] constitutes unfair competition and unfair and  
7 deceptive business acts and practices under statutory and common law...” (Id. at 16.) Plaintiff  
8 requests that the Court enjoin Defendants “from usurping Kforce’s trade secrets and goodwill,  
9 soliciting a key customer serviced by Oxenhandler and Bell and Kforce’s Internal Division,  
10 soliciting other core (internal) employees to leave Kforce, and delivering advertising material  
11 stolen from Kforce and altered to present as VHA’s capabilities those which are in fact  
12 Kforce’s.” (Id.)

13 In support of an unjust enrichment claim, Plaintiff alleges that Defendants have been  
14 unjustly enriched by “using Kforce’s trade secrets, proprietary information, and advertising  
15 terms describing its capabilities deceptively to present those capabilities as Walker’s and  
16 VHA’s...” (Dkt. No. 21 at 18.)

### 17 III. Preemption Analysis

18 Upon assessment of the facts underlying Plaintiff’s claims, the Court concludes that the  
19 claims are preempted by the UTSA to the extent that they are based on various allegations of  
20 theft and misuse of confidential, proprietary, or otherwise secret information because the  
21 underlying facts are not independent of the facts that support Plaintiff’s UTSA claim. The Court  
22 finds, however, that to the limited extent that the claims are based on the direct solicitation of  
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1 Plaintiff's customers or employees not involving the use of confidential, proprietary or otherwise  
2 secret information, the claims are not preempted.

3 In arguing that its claims are not preempted, Plaintiff identifies numerous examples of  
4 conduct that it believes are independent of the misappropriation of trade secrets, but that involve  
5 the theft or misuse of confidential, proprietary or otherwise secret information. For example,  
6 Plaintiff argues that Defendants breached their fiduciary duties by funneling helpful competitive  
7 information to VHA, misusing Kforce resources, and accessing Kforce information with stolen  
8 passwords. (Dkt. No. 36 at 13-15.) Plaintiff further identifies "emailing non-trade secret  
9 information such as candidate resumes, writing samples, and client locations," and "use of a  
10 Kforce Capabilities Report to benefit VHA" as examples of conduct which is independent of the  
11 misappropriation of trade secrets. (*Id.*) These factual allegations are inseparable from those  
12 underlying the UTSA claim.

13 Plaintiff's attempts to draw an artificial distinction between confidential and proprietary  
14 trade secrets and confidential and proprietary "non-trade secret information" are unavailing. *See,*  
15 *e.g., Int'l Paper Co.*, 2012 WL 1857143 at \*7 ("UTSA's preemption provision has generally been  
16 interpreted to abolish all free-standing alternative causes of action for theft and misuse of  
17 confidential, proprietary, or otherwise secret information falling short of trade-secret status").  
18 Furthermore, Plaintiff itself identifies information regarding its customers, including their  
19 locations and contact information, information regarding its job applicants, including a  
20 "compilation of employment Applicants," and information contained in its proprietary databases,  
21 as trade secrets. (Dkt. No. 21.) The underlying factual allegations – that Defendants improperly  
22 acquired and used information that belongs to Kforce for their own advantage – are identical, and  
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1 Plaintiff cannot both claim trade secret protection for its proprietary information and then argue  
2 that the theft and misuse of the same information is “independent of” its trade secret claim.

3 Plaintiff’s claims relating to Defendants’ acquisition and use of Kforce’s information for  
4 their own benefit are preempted. Therefore, Plaintiff may not rely on any conduct relating to the  
5 theft or misuse of confidential, proprietary, or otherwise secret information for its breach of  
6 fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with business  
7 expectancy, unfair competition, or unjust enrichment claims.

8 The Court agrees with Plaintiff, however, that claims based on the solicitation of Kforce  
9 customers and employees—where that solicitation was made without the use of confidential,  
10 proprietary, or secret information—are factually independent of the UTSA claim, and therefore  
11 are not preempted. The court in Thola recognized this difference when it found that evidence of  
12 in-person client solicitation was distinct from evidence offered to prove a UTSA violation  
13 because the solicitation evidence did not involve the acquisition or disclosure of information.  
14 Thola, 140 Wn. App. at 82-83. Here, Plaintiff may rely on evidence of Defendants soliciting  
15 Kforce employees and customers in support of its surviving common law claims if that evidence  
16 does not involve the theft or misuse of Kforce information.

#### 17 IV. Unfair Competition under the Consumer Protection Act

18 Defendants argue that even if Plaintiff’s unfair competition claim is not preempted by the  
19 UTSA, they are entitled to summary judgment because Plaintiff cannot meet the public interest  
20 impact requirement of the Consumer Protection Act (“CPA”). (Id. at 10-12.) The Court agrees.

21 In order to prevail on a private CPA claim, “a plaintiff must establish five distinct  
22 elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public  
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1 interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation.”

2 Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780 (1986).

3 “An act or practice is ‘unfair or deceptive’ under the CPA only if it has the capacity to  
4 deceive ‘a substantial portion’ of the public.” See Swartz v. KPMG, LLC, 401 F.Supp.2d 1146,  
5 1153 (W.D. Wash. 2004) (citing Henery v. Robinson, 67 Wn. App. 277, 289-91 (1992)), aff’d in  
6 part, rev’d in part on other grounds by 476 F.3d 756 (9th Cir. 2007).

7 The CPA is meant to protect the public, not to provide an additional remedy for private  
8 wrongs. Lightfoot v. MacDonald, 86 Wn.2d 331, 333 (1976). Consequently, a dispute between  
9 private parties—as opposed to a consumer transaction involving a public-facing business—has a  
10 public interest impact where there is a “likelihood that additional plaintiffs have been or will be  
11 injured in exactly the same fashion.” Hangman Ridge, 105 Wn.2d at 790.

12 The Court concludes that Plaintiff cannot demonstrate the public interest impact required  
13 for an unfair competition claim. This is a private dispute between two competitors, based on  
14 contracts signed by the Parties involved, pertaining to restrictive covenants prohibiting certain  
15 actions by employees of the two companies. See Hangman, 105 Wn.2d at 790 (“Ordinarily, a  
16 breach of a private contract affecting no one but the parties to the contract is not an act or  
17 practice affecting the public interest.”). The harm here is to Plaintiff, not to the public. Plaintiff  
18 argues that “there is a real potential” that additional plaintiffs will be harmed in the same manner  
19 due to Defendants’ “pattern of misconduct with Kforce and at least four other competitors.”  
20 (Dkt. No. 36 at 19.) But conduct affecting a small portion (four firms) of a niche market  
21 (technology specialty staffing firms) does not harm a substantial portion of the general public,  
22 especially where the companies do not offer services to the public. Because there has been no  
23 showing that the public has been or will be harmed by the conduct alleged here, and no showing  
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1 that that public would be protected by allowing the CPA claim to proceed, the Court GRANTS  
2 summary judgment on Plaintiff's CPA unfair competition claim.

3 V. Failure to Prepare Fed. R. Civ. P. 30(b)(6) Deponent

4 Defendants request that the Court grant summary judgment on all of Plaintiff's claims as  
5 to the solicitation of Kforce customers because Plaintiff's Fed. R. Civ. P. 30(b)(6) deposition  
6 designee was unprepared and uninformed and could not name any customers that had been  
7 solicited. (Dkt. Nos. 34 at 12-14, 39 at 9-11.) Plaintiff contends that this argument should be  
8 rejected because Defendants improperly seek to transform a discovery dispute into a dispositive  
9 motion. (Dkt. No. 36 at 20-26.)

10 The Court DENIES Defendants' request to grant summary judgment on all claims as to  
11 customer solicitation based on Mr. McCallum's lack of knowledge during his deposition. The  
12 Court advises Defendants that they may bring a motion in limine to exclude any evidence that  
13 was not disclosed during the deposition or otherwise provided during the course of discovery.

14 **Conclusion**

15 Defendants' Motion for Partial Summary Judgment is GRANTED in part and DENIED  
16 in part. Plaintiff's claims are preempted by the UTSA to the extent they are based on the theft  
17 and misuse of confidential, proprietary, or otherwise secret information. Plaintiff's claims are  
18 not preempted to the extent they are based on solicitation of customers and employees which did  
19 not involve the theft or misuse of information. Summary judgment is GRANTED on Plaintiff's  
20 CPA claim because this is a private dispute between two competitors and their employees based  
21 on restrictive covenants in their employment contracts and does not have a public interest  
22 impact. Summary judgment on all claims as to customer solicitation due to Plaintiff's Fed. R.  
23 Civ. P. 30(b)(6) deposition designee's testimony is DENIED.

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2 The clerk is ordered to provide copies of this order to all counsel.  
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4 Dated this 24th day of April, 2015.  
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8 Marsha J. Pechman  
9 Chief United States District Judge  
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